85-1261

Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

IN RE THE MATTER OF MORRISON SINGLE COUNTY DITCH NO. 1330
(FLOYD AND RITA MEYERS-vs.- THE SENECA COUNTY, OHIO BOARD OF COMMISSIONERS)

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ISSUES ON APPEAL

I. DRAINAGE ASSESSMENTS ON ANY PARCEL OF LAND ARE CONSTITUTIONALLY REQUIRED BY THE OHIO AND UNITED STATES CONSTITUTIONS TO BE DIRECTLY PROPORTIONATE TO THE "BENEFITS" CONFERRED ON THE PARCEL BY THE PROJECT IMPROVEMENT; AND CAN NEVER EXCEED THE TOTAL BENEFIT CONFERRED. THE DECISIONS OF THE OHIO COURTS IN THIS CASE VIOLATE THESE PRINCIPLES AND PROTECTIONS AND DEPRIVE THE APPELLANTS OF THEIR CONSTITUTIONAL RIGHTS TO DUE PROCESS; EQUAL PROTECTION; AND RESULTS IN A TAKING OF THE APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW VIA THE UNCONSTITUTIONAL INTERPRETATION BY THE OHIO COURTS.

II. O.R.C. §131.15 AND §131.01, THOUGH AMBIGUOUS, ARE SUBJECT TO A CONSTITUTIONALLY ACCEPTABLE INTERPRETATION; SUCH INTERPRETATION PERMITS DRAINAGE ASSESSMENT FORMULAS TO ONLY INCLUDE THOSE FACTORS ENUMERATED IN §131.15 SINCE THE LEGISLATURE HAS SPECIFICALLY DIRECTED THE ENGINEER AS TO THESE CRITERIA TO BE USED AND THIS MUST BE STRICTLY ADHERED TO BECAUSE THIS CHAPTER IS IN DEROGATION OF COMMON LAW.

III. ASSESSMENT FORMULAS WHICH INCLUDE A "NEED" FACTOR AND/OR A [illegible] FACTOR AND ASSESSMENT FORMULAS NOT PROVIDING FOR THE FIVE FACTORS ENUMERATED IN §131.15 BOTH VIOLATE THE APPLICABLE STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR ASSESSMENTS AND THEREFORE MUST BE DISAPPROVED.

IV. TO LEVY ON ADJACENT FARM LANDS, OF ESSENTIALLY THE SAME OR IDENTICAL CHARACTERISTICS, SUBSTANTIALLY DIFFERENT ASSESSMENTS, ONCE ESTABLISHED IN TRIAL, THEN SHIFTS THE BURDEN TO THE APPELLEES (COMMISSIONERS) TO ESTABLISH NOT ONLY THAT THE BENEFITS TO BE DERIVED TO THE RESPECTIVE PARCELS ARE SUBSTANTIALLY AND PROPORTIONATELY DIFFERENT BUT ALSO THAT THE COSTS EXCEED THE BENEFITS.

V. THE OHIO SUPREME COURT HAS A DUTY UNDER OHIO LAW TO CONSTRUE AND INTERPRET STATUTES SO THAT THEY ARE CONSTITUIONAL IN THEIR FUNCTION AND APPLICATION; IN THIS CASE OHIO REVISED CODE SECTIONS §131.15 AND §131.01; THE OHIO SUPREME COURT ERRED IN FAILING TO INTERPRET THE STATUTES CITED SO THAT THEY ARE CONSTITUTIONAL IN APPLICATION AND FUNCTION.

LIST OF PARTIES TO THIS APPEAL

1. Floyd and Rita Meyers, represented by Attorney J. Vincent Buchanan, Buchanan & Stotzer, 8500 U.S. 23 North, Risingsun, Ohio 43457, and Attorney William Caughey, 221 E. Front, Pemberville, Ohio 43450, who is counsel of record.

2. County Commissioners of Seneca County, Ohio, in their official capacity, represented by Prosecuting Attorney of Seneca County, Ohio, Mr. Steve Shuff, and his assistant, Ms. Elaine Knutson, 106 E. Market Street, Tiffin, Ohio 44883.

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GROUNDS FOR JURISDICTION

This is an appeal from the assessment of project costs in a ditch improvement under Ohio Revised Code Chapter 61. On October 30, 1985, the appellants here received an adverse ruling on the issues presented here in their appeal to the Ohio Supreme Court. Notice of Appeal was filed with that Court on December 24, 1985, a copy of this notice appears as Appendix E to this Statement of Jurisdiction.

Ohio Revised Code Section 6131.25 allows:

> [a]ny affected landowner [to] appeal to the Court of Common Pleas within twenty-one days of the date that any order was

issued by the Board of County Commissioners, as provided in Sections 6131.01 to 6131.64 of the Revised Code, and may appeal any one or more of the following questions:

(A) Is the improvement necessary?

* * *

(E) Are the assessments levied according to benefits"

* * *

The appeal may be taken from any order affecting any part of the improvement as well as from any order affecting any part of the improvement as well as from any order affecting the entire improvements.

Further, the appellants state that they have the constitutional

right to initiate legal actions disputing the constitutionality of any legislative act or court order which materially and substantial affects them and is unconstitutional in application, content, or purpose. See, McCulloch .. Maryland, 4 Wheat., 316 (1819); and Anderson v. Brown, 12 O.S. 2d 52, 42 O.Ops 2d 100, N.E. 2d 584. The appellants here are materially and substantially affected by the lower courts' rulings in this matter, and by the statutes themselves.

These Ohio statutes, §131.01 and §131.15, (attached hereto as Appendices F and G, respectively) can be reconciled with the constitutional requirements of Ohio

and Federal Constitutions, and although they are ambiguous, they can and thus must be interpreted to give them constitutional effect. The Ohio Courts have not done so, and in refusing to interpret the statutes as explained by appellants, they have forced an interpretation of the statutes which results in deprivation of the constitutional rights of the landowners.

The Ohio Constitution, and Ohio case law supports the appellants' contentions that the method of assessment utilized in this case and throughout Ohio by the Ohio Courts is unconstitutionally defective, and violative of the appellants' rights to due process and equal protection.

Article I, Section 19 of the Ohio Constitution, and the Ohio cases of In Re County Ditch, 122 O.S. 226 (1930); Chamberlain v. City of Cleveland, 74 O.S. 551; Walsh v. Barron, 41 O.S. 15, and Alma Coal Co. v. Cozad, 79 O.S. 348, all state the position that "[t]he provisions of the Constitution forbid, not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another." Further, Ohio law stated in State ex rel. v. Otter, 106 O.S. 416 (1922), "that to be constitutional assessments must not proportionally exceed the benefits." This determination is even more clearly stated in

application to the facts of this case in Blues, et al. v. Harbin, et al., 94 O.S. 247, where it was determined that the amount of land in the watershed alone is an improper criteria for determination of benefits. All the issues presented by this appeal, (except for the final issue, [Issue VI, regarding the failure of the Ohio Supreme Court to interprete the relevant statutes so as to give them a constitutionally permissible interpretation) were raised in the trial court, and appellate court. Issue V is raised here after the Ohio Court ruled adversely to the only possible constitutional interpretation. All issues herein

presented were determined adversely to the appellants' position at all stages of the proceedings (except for the first ruling of the trial court discussed above).

VERBATIM RECITATION OF RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Full copies of the relevant provisions, statutes, ordinances, and regulations are set out in appendices and the specific appendices are listed in the Table of Authorities and Reference to the Official and Unofficial Reports on page VI, supra.

STATEMENT OF FACTS

For decades the Supreme Court of the State of Ohio has left a major void in the direction of how farmland assessments for drainage ditches are to be made under Chapter 6131 of the Ohio Revised Code. This neglect has resulted in assessment formulas which now vary from county-to-county, engineer-to-engineer, and in some instances within the counties themselves, e.g., in joint county projects where only one of the county's formulas is used and applied for all the counties in the joint project. Bounded by constitutional requirements of private property being inviolate.

the legislature has continuously given the courts and the engineers only general principles (61C1.15) factors without their relative value and specific examples (61C1.01). No where is a meaningful formula provided. As a result, assessment formulae and pseudo-formulae abound. The drainage system is a creature of state law, and as such its most important constitutional aspect - assessment - should also be subject to uniform application by way of state law.

The present ditch case involves the individually important issue of whether the farm family of Floyd and Rita Meyers have been properly assessed. More importantly,

however, to this Honorable Court is that the facts here [illegible] enable this Honorable Court to address the due process, equal protection, and other constitutional issues on assessments, which have nation-wide import and implications; and which alone financially affects and burdens this nation's largest industry (farming) more than any other single tax or assessment and more than all other taxes and assessments combined.*

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*The affect of ditch assessments is monumental. The present is not uncommon. Here 370 acres are being charged $29,590 or an approximate average of $75 acre (some acres were clearly assessed for more). In an era of declining farm prices, depressed commodity prices and numerous farm failures, an assessment of this nature can be, and often is, catastrophic and assists in further elimination of the family farm. Assessments also then become the base figure for permanent annual assessments of maintenance which can accumulate up to 20% of the original assessment for any given year. Maintenance over a 10 year period, then normally exceeds the total initial project construction costs and individual assessments.

In February of 1975, a ditch improvement was petitioned by individual landowners to the Seneca County, Ohio, Commissioners. At this time the projected cost of the entire project was estimated at less than $30,000.00. The Seneca County Engineer failed to perform the survey on this project until 1978, and did not submit his report to the Commissioners until January of 1981.

At that time, the projected assessable project cost was computed to be $126,577.22. Floyd and Rita Meyers were assessed $45,441.45 for a total of 529.5 benefited acres, which constituted 35.9% of the total cost of the project for only 9.7% of the benefited acres in the

watershed. In an effort to resolve the matter, the appellants and all of the landowners on the ditch, except for three individuals, hired an excavator to open up their ditches and level the spoil, and undertook to remove the brush and vegetation which had grown into the ditch. All issues involved in this appeal were raised by the appeal raised on April 24, 1981 when the Seneca County Court of Common Pleas viewed the ditch after this work was completed and then ordered the Seneca County Engineer to reassess the project taking into consideration the work that had been done by the individual landowners. That entry was made in Case No.

40417 on December 10, 1991.

Attached hereto as Appendix Item #D)

The Seneca County Engineer submitted to the Court a second set of assessments which only reduced the assessable cost of the project to $111,103.79. Further, after the Meyers had excavated their ditch and removed the brush and vegetation, they were assessed $39,590.02 for the same number of benefited acres as before, and were still assessed 35.63% of the total cost of the project. The appellants here again took these issues to the Seneca County Court of Common Pleas which on May 10, 1993 upheld the assessments (a copy of their opinion

is attached hereto as Appendix Item #B).

An appeal of the trial court's decision was taken to the Third Appellate District of the Ohio Court of Appeals. On October 1, 1984 that Court affirmed the trial court's decision. (A copy of the Opinion of that Court is attached hereto as Appendix Item #C.)

These appellants then appealed the decision of the Appellate Court to the Ohio Supreme Court which accepted the case for consideration. After oral argument on the issues presented here was heard, that Court on October 30, 1985 affirmed the lower courts. (A copy of that

Court's Opinion is attached hereto as Appendix Item #A.)

Notice of Appeal from the decision of the Ohio Supreme Court was filed on December 24, 1995. It is from the decision of the Ohio Supreme Court that this appeal is now taken. (A copy of same is attached hereto as Appendix Item #E.)

In addition to the facts disclosed above, the appellants state that the lower courts had before them the facts raised in the trial court which disclosed that three landowners who chose not to participate in the voluntary cleaning of the ditch, cited above,

and who had done nothing to correct the problems on their portion of the ditch were not given higher assessments, nor were those others who performed work given credit for their improvements.

Testimony was had at trial from drainage experts that the property of the appellants here would derive no significantly greater benefit than that of other landowners whose assessments were radically lower than the more than one-third of the total cost of the plan assessments against the plaintiffs. Testimony of experts disclosed that the property of appellants' neighbors, who were subjected to substantially smaller assessments would be

benefited and utilized similarly to that of the appellants, and that the amount of silt build up or dirt to be excavated on the appellants' property would be of virtually the same quantit, and quality as that of his neighbors whose assessments were substantially less. Further, the tax values of the assessed parcels according to the County Auditor were similar.

On the above basis the lower courts erred in applying an excessively burdensome assessment on the appellants where tne only constitution intrepretation of the statutes under Chapter 61 of the Ohio Revised Code would require the assessment be virtually equal.

The basis utilized for the unequal assessment of the project costs was a subjective standard, the degree of need, and degree of correction required, which the testimony of experts stated as being subjective and not based on the virtually equal benefits from the improvement, equal work needed at each location in the ditch course, and equal uses to which the land was put.

It is on the basis of the above facts that the appellants feel the subjective tests utilized to apply Chapter 61, particularly 6131.01 and 6131.15 are unconstitutional in that they deprive the appellants of equal protection, due process, and take

their property without due process of law.

REASONS WHY THIS CASE MERITS THE CONSIDERATION OF THE UNITED STATES SUPREME COURT

The largest industry in the United States is agriculture. The taxation and assessment of land improvement and maintenance projects are a major factor in the operation of the agricultural industry of the United States. Therefore, the assessments of maintenance and improvement projects of the nation's largest industry is of great public interest and importance, and have an immense and ongoing effect on the health and welfare of the nation's people and its economy.

Assessments of costs for

improvement and maintenance of the agricultural lands is necessary, however, the necessity of such governmental assessments of privately held lands places a high duty upon government to create, interpret, and apply assessment laws so that they treat all landowners with the equity, justice and fairness which our constitutional provisions and protections mandate.

In Ohio, and perhaps other states, the system of apportioning assessments has broken down. The Courts of the State of Ohio, and the Ohio Constitution, Article I, Section 19 (attached hereto as Appendix H), are obligated to apply assessments upon individuals in

relation to the benefits they derive from it. See also, In Re County Ditch, 122 O.S. 226 (1930); Chamberlain v. City of Cleveland, 34 O.S. 551; Walsh v. Barron, 61 O.S. 15, and Alma Coal Co. v. Tenad, 79 O.S. 348, all support the position that "[t]he provisions of the Constitution forbid, not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another." Further, Ohio law stated in State, ex rel. v. Otter, 106 O.S. 416 (1922), "that to be constitutional assessments must not proportionally exceed the benefits."

In the case of land maintenance

and improvement assessments the constitutional rights of the individual landholder are being violated. A system of assessment exists which unequally distributes the burdens of bearing the costs of improvements. This system deprives persons, such as in this case, Floyd and Rita Meyers, of their property without providing them the equal protection of law and due process. A uniform system of criteria and assessment standards does not exist leaving a lack of uniformity in assessments between individuals. This discrepancy is not justifiably on any basis. The process is violative of the rights of an individual to receive equal

protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution regarding the taking of property without due process of law.

The so called Preble County assessment formula (attached hereto as Appendix I), fails to cover virtually all of the criteria specifically enumerated by the Ohio legislature as required in determining assessments.

> The Preble County formula uses eight factors (only seven were used herein - the eighth was not applicable or used) to

assess individual parcels:[1]

(1) Distance of assessed property from end terminus,
(2) Use of land,
(3) Topography of land,
(4) Soil type of land,
(5) Degree of need of assessed land,
(6) Degree of Correction project will provide and private landowners need for tiling,
(7) Total area of land to be benefited.

The forumula then states, with no explanation whatsoever, that the

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[1]It should be noted that the sparsely of the explanation of criteria 5 and 6, as provided in the formula explanation itself, allows only for 5 and 6 to be speculated as to what was actually intended. This would only further support, and expand, the appellants' argument of denial of due process and complete ambiguity of the taxing standards.

following is the proper mathematical calculation for finding an individual landowner assessment from the listed factors:

A) (1) + (2) + (3 + 4) + (5 + 6) x benefited acres = Total Units;

B) Total Units ÷ Grand Total Units x Grand Total Project Cost = Assessment.[2]

Turning now to the criteria that the Ohio Legislature

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[2]This formula is present as laid out in the Preble County formula itself. As can be seen it is poorly written, not disclosing whether you divide first in part B, or multiply first.

established in Ohio Revised Code Chapter 6131 for determining assessments (effective April 1981) makes it abundantly clear that the so-called Preble County Formula fails to meet the legislative criteria.

O.R.C. 6131.15 enumerates the following criteria in determining assessments:

> 1. ". . . the county engineer shall give primary consideration to the potential increase in productivity that the parcel may experience as a result of the improvement and shall also give consideration to . . ." (emphasis added)
>
> 2. quantity of drainage contributed,

3. relative location of the property to the project,

4. portion of the project through which the drainage from the parcel flows,

5. value of the project to the watershed,

6. and benefits as defined in 6131.01 (O.R.C. 6131.15 emphasis added.)

The Preble County formula does not give primary consideration to increase in productivity. In fact, it does not even provide for the increase in productivity factor. It furthermore does not provide for the third criteria listed above nor does it provide for the fifth criteria. The Preble County formula factors

(2), (3), (4), (5), and (6) listed supra, all directly and solely relate to number two above; they all affect and determine the quantity of drainage provided by the parcel. Number 4. above is related to (1) in the formula. In summary, only two of the first five criteria listed by the legislature are addressed in the Preble County formula.

Since 6131.15, number six above, further incorporates the criteria as contained in O.R.C. 6131.01 of the definition of benefits, the factors listed in O.R.C. 6131.01 must also be reviewed and compared to the Preble County formula. O.R.C. 6131.01 (F) lists numerous factors and criteria in its

definition of enefits. First it states as a general principle that "benefit . . . means advantages to land and owners, to public corporations as entities, and to the state resulting from drainage, conservation, control and management of water, and environmental, wildlife and recreational improvements. It is obvious from the prior discussion of the Preble County formula that the said formula does not consider in any manner environmental, wildlife and recreational improvements.

Continuing in O.R.C. 6131.01 (F) the Section then states that "factors relevant to whether such advantage results, and it would

appear that these three factors (R.C. 1.01 (F) (1., 2., 3.) are included in the formula. However, the legislature then went on to state that "'Benefit' or 'benefits' includes any or all of the following factors." (emphasis added) Two of these are also not provided for in the Preble County formula. Elimination or reduction of damage from flood . . . Increased value of land resulting from the improvement.

It becomes obvious that by comparing the Preble County formula, which the Ohio Supreme Court approved, with the legislative criteria that much is absent in formula in determining assessments. At least six legislative factors are

not covered at all by the Preble County formula; to-wit: 1) increase productivity, 2) location of property to project, 3) value of project to assessed land, 4) environment, 5) wildlife, and 6) recreation. Also the factors in the formula are not weighted at all as the legislature has established. There is no primary consideration given to the increased productivity (or decrease implicit) of the assessed parcel because of the project.

As is shown by the above analysis, not only does the Preble County formula fail to consider or meet all the criteria for determining assessments under O.R.C.

§131.01 and .15, but these statutes themselves create a confusing and unintelligible procedure for assessing improvements to landowners. The two statutory provisions attempt to explain how the factors of "benefit" is to be understood. However, the result is a confusing, overlapping, and complex mishmash that does not land itself to a uniform understanding or application. This failing results in a loss of equal protection of the laws by making impossible equal and uniform standards for assessment by differing county engineers, commissioners, or plans. Further, the burdensome, and confusing definitions deprive landowners of

their ability to argue or understand how the assessment distribution was made, or whether the assessments were fair. Thus, landowners are denied their rights (to due process of law before a taking of their property) by the lack of a full, and fair hearing on assessments. The standards set by the Ohio Courts rulings effectively tell the county engineer, and commissioners that their assessment may be totally based on their subjective, and thus non-reviewable, interpretation of who should pay. The results, in this case are clear Mr. and Mrs. Meyers without any ability to determine whether the assessment of the property is correct (because the

standards by Ohio Court decisions are now totally subjective, have been assessed an amount on their land which is almost four times greater than the assessment on comparable and similar land. Even if their need were greater, or their benefit greater such an exhorbent assessment based on subjective, and unreviewable criteria denies them an ability to examine the fairness and equity of the assessment.

The consideration of the case set out here, and a ruling for appellants in this case would send a signal to the courts of the fifty states that the apportionment of land improvement and maintenance assessment by the states must be

based upon constitutionally protected rights and not unfairly and unaccountably burden some landowners while unfairly benefiting others. It would send a signal to state courts that they, the state courts, must constitutionally interpret their laws where they seek to assess land costs, and that they should not sit aside in the area of land assessments and allow the system to degenerate and decay into a parochial system which is inherently confusing, contradictory and results in the deprivation of constitutional protections. It would signal to all courts that the proper method for assessing the costs of improvements to land is,

and should be, the same as that used in all other areas of taxation: which are based on the benefit to the landowner, not the need for improvement. It will tell the states that, for example, you may require a landowner to submit to improvements to his land which solely benefit another landholder, but you will not be allowed to make him then pay for the benefit to that other individual. To do otherwise would be to take the propoerty of the landowner without due process of law and denying his equal protection under the law by benefiting another while burdening him without any compelling reason or rationale basis.' Fundamental principles of

fairness and equity would dictate that it should be otherwise.

For this statute to be applied constitutionally the legislatively intended distinctions and different uses for the word "Benefit" must be understood. By approving the Preble County formula and the Ohio Supreme Court failed to recognize these distinctions and different uses intended by the legislature. O.R.C. Chapter uses the word "Benefit" in various different sections. The two sections to be discussed here are relevant and sufficient to show the intended distinction for the meaning of the word benefit. O.R.C. 5571.15 is the section that uses "benefit" for the county engineer's use in his

determination of assessments.

O.R.C. 6131.21 and 6131.22 are the sections that use "benefit" for the board of county commissioners' use in their final determination of whether the project proceeds and whether assessments are correct. Not only are the functions of the engineer and commissioners different but so too is the intended use by the legislature of the word "benefit" in these sections.

O.R.C. 6131.15 enumerates 5 specific criteria which the county engineer is to use in determining assessments. It then incorporates the definition of "benefit" as contained in 6131.01 (F). This

reference is solely to cover those of the five in 6131.15 specifically enumerated again in 6131.01 and to refer to the specific examples that constitute an "advantage of land". It is not intended to cover all items listed in 6131.01; if it were then the Ohio Supreme Court's decision approving the Preble County formula clearly is constitutionally defunct. See Preble County formula comparison to Statutes 6131.15 and .01, supra.

O.R.C. 6131.21 specifies that the board shall consider in approving or disapproving the project "(F) The benefits to the public welfare; and (G) The benefits to land, public corporations and the

state needing the improvement: . . ." This written distinction combined ((F) and (G)) with the O.R.C. 6131.22's statement that the board shall "hear any competent evidence on the question of benefits" would support the position that the board is to consider all the factors of the word "benefit" used in O.R.C. 6131.15 and all used in O.R.C. 6131.01. Factors stated in O.R.C. 6131.01 such as advantages resulting from ". . . conservation, control and management of water, and environmental, wildlife and recreational improvements" are broad public welfare and the general public considerations.

Only by allowing for the word

"benefit" is to have different application and meaning, depending on whether it is being directed to the county engineer or to the county commissioners. In the Drainage Chapter of the Ohio Revised Code can the multitude of confusion and ambiguity be reconciled. Once this is accepted it then becomes constitutionally mandated that 6131.15 be strictly interpreted since it is derogation of common law and involves the taking of property through taxation. The Ohio Supreme Court approved a method in its decision herein which is not even a close approximation to the 5 specific criteria listed by the legislature in O.R.C. 6131.15.

To be interpreted to uphold the constitutional protections set out, supra, the statutes, §131.01 and §131.15, as well as §131.21 and .22 must be understood to require the following assessment procedure. The county engineer, in creating the total project cost, should use only the first 5 criteria set out in §131.15, giving primary consideration to the potential increase in productivity of the lands. The sixth criteria "benefits" should be explained separately for each landowner, to enable the county commissioners to review his opinion and analysis before setting the assessments to the individual landowners.

The county commissioners, as is required by 6131.21 should take the total project assessment and weigh the cost of the improvement against the public interest benefits of the project, as mandated by that section. Once they have determined that the private and public interest benefits of the project outweigh the burdens and expenses of the project: then they (the commissioners), should use the criteria set out in section 6131.01 and the opinion and analysis of each individual landowners benefit, as presented by the county engineer under 6131.15 (6), to determine if, and how much of, the total project cost should be adjusted from an equal per acre

distribution between comparable and similar land based on the public and private overall "benefits" criteria. Thus, an individual would have an understanding of how the total project cost was arrived at. He would have an ability to discuss his assessment and benefits with the commissioners at a full and fair hearing. His opinions would be considered in light of the opinions of county engineer as to the "benefit" criteria analysis he performed in accordance with 6131.15. This interplay of commissioners' criteria, landowner input, and county engineer opinion analysis would result in an assessment which complies with both

equal protection, and due process standards.

The "benefits" provision of §731.15 should be read as requiring the county engineer to prepare his analysis of individual landowner benefits from the overall project, and not as a mandatory calculation in considering his assessment of the overall project assessments. It is for the commissioners, under §731.21 and .22 to establish the individual assessment, and the benefits provision of §731.15 should only be available to them to help them set an assessment which is different than that for the other landowner assessments per acre in the improvement. The method of

construing 6131.01 and 6131.15 to allow the county engineer to calculate individual assessment for the commissioners, and having them adjust, not to the increased or decreased benefit (as our analysis would), but away from the subjective opinions of the county engineer (based on his personal method of assessment improvements) causes the landowner to lose his ability to attack or understand how the assessments were made. The determination of the need for a change in distribution of assessments from a simple division of the total cost of the project by the total number of acres in the project, multiplied by an individual

landowner's acreage, should be a determination made by the commissioners. It should be a shifting from a per acre assessment to a per amount benefited in light of an analysis of individual landowner benefit (as defined by §131.01 in light of the county engineer's opinion under §131.15), the commissioners' own analysis of individual landowner benefit under §131.01, and the landowner's imput at his hearings. It should not, and constitutionally cannot be a fight to bring the county engineers' subjective analysis, which is adopted pro forma by the county commissioners back to a parity with landowners of comparable and similar

lands.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF OHIO

IN RE APPEAL IN THE
MORRISON SINGLE COUNTY
DITCH NO. 1110

Appeal from the Court of Appeals for
Seneca County

Case No. 84-1817

This appeal arises from a decision of the court of appeals approving a final schedule of assessments made by the board of county commissioners for a ditch improvement.

In 1975, this ditch improvement was petitioned by landowners in the Morrison Ditch watershed area of Seneca County. At the time of the petition, that portion of the ditch

upon the lands of Floyd and Rita Meyers, appellants herein, was virtually obliterated and had been cultivated and planted.

The Seneca County Engineer calculated the assessments for the ditch improvement, applying the so-called "Preble County" formula, and submitted his report to the Board of County Commissioners of Seneca County, appellees herein, in January 1981. Many of the landowners, including appellants, hired a private excavator to make improvements in an effort to reduce the assessments.

These landowners appealed to the Court of Common Pleas of Seneca

County which ordered the county engineer to make a second assessment taking into account the excavation work. The excavations, however, proved insufficient and the second schedule of assessment was not significantly lower than the first. Appellees then approved the new assessments.

The appellants, who owned approximately ten percent of the affected acreage, were assessed approximately thirty-six percent of the total project cost. They again appealed to the common pleas court, claiming their assessments were unconstitutionally disproportionate to the benefits which they received. Appellants also contended that the

formula used to calculate the assessments did not properly determine benefits as required by R.C. 6131.15 and 6131.01.

After a trial de novo, the court entered its findings of fact and conclusions of law approving the assessments and specifically approving the "Preble County" formula as a reasonable method of determining benefits.

On appeal, appellants again attacked the formula used to calculate assessments and again claimed that their assessments were unconstitutionally disproportionate to the benefits received. Appellants also contended that the

trial court erred in placing the burden of proof upon them at the trial de novo. Appellees argued that the formula used to calculate the assessments was valid and that appellants' assessments were not disproportionate. Appellees further argued that the burden of proof was properly upon appellants.

The court of appeals affirmed the judgment of the trial court, reasoning that the factors used in the "Preble County" formula were consistent with "benefits" as defined by R.C. 6131.15 and 6131.01. The court of appeals further held that appellants had not sustained their burden of proof in showing disproportionate assessments, as

their lands had most needed the ditch improvement and received the greatest benefits thereby.

The cause is now before this Court pursuant to the allowance of a motion to certify the record.

Buchanan & Buchanan and J. Vincent Buchanan, for appellants.
Steve C. Shuff, prosecuting attorney, and Elaine J. Knutson, for appellees.

Celebrezze, C.J. The question presented involves the constitutionality of a ditch assessment calculated by using the "Preble County" formula. Appellants contend that two factors in that formula, "degree of need" for improvement and "degree of problem correction," violate the applicable

statutory and constitutional requirements for ditch assessments.

This court stated in In Re Appeal in the Joint County Ditch No. 1 (1970), 122 Ohio St. 226, 236, that an assessment disproportionate to the benefit received was in effect an unconstitutional taking of private property. R.C. 6131.15 states, in pertinent part, that "***[t]he county engineer, in making his estimate of the amount to be assessed***shall levy the assessments according to benefits. Each tract of land***affected by an improvement***shall be assessed in the proportion that each is benefited by the improvement, as 'benefit' and 'improvement' are

defined in section 6111.11 of the Revised Code, and not otherwise."

R.C. 6111.01(F) defines "benefits" as advantages to land and owners and provides that "***[f]actors relevant to whether such advantages result include:

"(1) The watershed or entire land area drained or affected by the improvement;

"(2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;

"(3) The use to be made of the improvement by any owner***."

This subsection further

provides that "benefits" may include any or all of the following: Elimination or reduction of flood damage; removal of water conditions that jeopardize public health and safety; increased value of land as a result of the improvement; use of water for irrigation or soil conservation; and providing an outlet for accelerated runoff.

We find that the formula used in calculating appellants' assessments accurately determined the assessments in proportion to the benefits accruing to appellants' lands. The evidence adduced at the trial de novo clearly showed that the portion of the ditch upon appellants' lands was most in need

of drainage and required the highest degree of correction. Appellants' portion of the ditch was almost completely closed and had been plowed and cultivated. Their lands had the most potential for flooding and soil erosion after a rain. Although the "degree of need" and "degree of problem correction" elements of the formula are not per se enumerated by R.C. 6131.01(F), these elements are consistent with the statutory factors relevant to whether advantages result from improvements. Such resulting improvements reduce flood damage and increase the value of appellants' lands, both "benefits" as defined by statute. These elements are further

consistent in view of R.C. 6131.15, which states that in estimating an assessment, the county engineer shall give primary consideration to the potential increase in productivity of the land which may result from the improvement. It is obvious that the improvement of this ditch will result in the increased productivity of appellants' lands.

We therefore conclude that the use of the "Preble County" formula gave a rational and justifiable basis to the calculation of appellants' ditch assessments, consistent with the applicable controlling sections of the Revised Code, and demonstrated an assessment in which appellants' greater need

was proportionate to their greater benefits from the improvement.

Appellants also contend that the trial court erred by placing upon them the burden of proving, at the trial de novo, that their assessments were not in proportion to the benefits received. Appellants argue that once they made a prima facie showing that the assessments on their lands were substantially in excess of the other landowners' assessments, the burden of proof shifted to appellees to rebut this evidence. This contention is without merit. R.C. 6131.25 provides the mechanism for an appeal of an assessment to the court of common pleas. R.C. 6131.30

explicitly states that on appeal "* * * the burden of proof shall be on the owner having the affirmative of the proposition, who shall have the opening and closing. * * *" Accordingly, the burden was properly upon appellants here throughout the trial de novo to demonstrate the unlawfulness of the assessments.

For the reasons stated, the judgment of the court of appeals is affirmed.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF
SENECA COUNTY

In the Matter of:
The Appeal in the Morrison
Single County Ditch No. 1330
Petitioned for by Marie Fennie,
Ruth Sore, Virgil Hunte and
others

Case No. 40447

JOURNAL ENTRY OF JUDGMENT
AND FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter came before the Court upon appeal from the decision of the Seneca County Board of Commissioners on the 22nd day of February, 1983. The Court, having heard testimony and fully considered the evidence in this case, is of the opinion that the improvement is necessary and will be conducive to

the public welfare, and that the cost thereof will be less than the benefits. The Court further finds that the root termini and mode of construction as set forth in the plans of the Seneca County Engineer's office is the best to accomplish the purpose of the improvement. The Court further finds that the method used by the Seneca County Engineer's office in determining assessments, known as the "Preble County method" or as set forth in Appellee's Exhibit F entitled "Rational Determination of County Ditch Assessments," is a reasonable method of determining benefits and said method is hereby approved.

The Court further finds that there were two assessment schedules prepared--one at the time the project was originally approved by the Seneca County Board of Commissioners, and one prepared subsequently to take into account changes in the ditch made by landowners after the original schedule was prepared. The Court is of the opinion that the second assessment schedule most accurately reflects the present circumstances and said assessment schedule is hereby approved.

The Court further finds that certain corrections in the assessment schedule as set forth in Appellee's Exhibit T are needed and

said corrections, as set forth in Appellee's Exhibit T are hereby approved.

The Court further finds that there may be other corrections required in the assessment schedule in regard to land ownership since there may have been changes in land ownership since the assessment schedule was prepared. Engineer's office prepare a final schedule of assessments and submit such final schedule to the Court for approval.

It is further ORDERED, ADJUDGED AND DECREED that the findings made herein be, and the same hereby are certified to the Clerk of the Board of County Commissioners.

It is further ORDERED, ADJUDGED AND DECREED that the costs before the Board of County Commissioners and the preparation of the final schedule of assessments be and hereby are made a part of the costs of the improvement.

It is further ORDERED, ADJUDGED AND DECREED that the costs incurred on the appeal herein be paid by the appellants herein.

APPENDIX C

COURT OF APPEALS

SENECA COUNTY, OHIO

THIRD APPELLATE DISTRICT

IN THE MATTER OF:

THE APPEAL IN THE MORRISON

SINGLE COUNTY DITCH NO. 1330

(FLOYD AND RITA MEYERS, APPELLANTS)

CASE NO. 13-83-13

OPINION

GUERNSEY, J. This is an appeal from the Court of Common Pleas of Seneca County challenging the assessments on the land of appellants, Floyd and Rita Meyers, for ditch repair improvement approved by the Board of County Commissioners of Seneca County as to

a portion of the ditch known as Morrison Single County Ditch No. 1330.

In February of 1975 a petition for ditch improvement was filed by individual landowners with the board. The Seneca County Engineer did not submit his report to the board until January of 1981 and, at that time, the projected assessable project cost was computed to be $126,577.22, with the appellants' land being assessed $45,441.45. They claim that this sum constituted 35.9% of the total cost of the project, while the land owned by them amounted to only 9.7% of the benefited acreage in the watershed. In an effort to reduce the costs of

the proposed ditch repair, all but three of the landowners affected hired an excavator to do some repair work. As a result, the lower court ordered the engineer to reassess the project.

The second assessment showed a reduction in cost of the whole improvement to $111,103.79 of which the appellants' portion was $39,590.02. Reflecting these figures the appellants now claim that for owning 10% of the acreage involved they now are assessed 36% of the total cost of the project.

It is from the lower court's approval of the repair of the ditch, as thus reassessed, that appellants

initiated this appeal. The assign

error in two particulars:

> "I. The trial court erred in approving the second set of assessments * * * because the assessments were not levied in accordance with Ohio Revised Code Section 6131.15 which requires that all assessments to property affected by the improvement must be ascertained by the benefits derived by that property.
>
> "II. The trial court erred in approving the second set of assessments * * * on the grounds that the decision is against the manifest weight of the evidence."

Appellants allege violation of R.C. 6131.15. That statute speaks to the levying of assessments upon landowners of a proportionate share of the cost of ditch construction or

repair. As to privately owned land the engineer is directed to prepare a schedule of assessments, entering an individual assessment as to each tract of land, and an explanation of the benefits by reason of the construction or improvement upon which the assessment is based.

The engineer is directed by the statute in his determination of the amount of assessment to each owner affected, both as to matters to be considered and as to the character of benefits to the land. As to matters to be considered, the statute prescribes:

> "In determining the estimated drainage assessments for a parcel,

the county engineer shall give primary consideration to the potential increase in productivity that the parcel may experience as a result of the improvement and shall also give consideration to the quantity of drainage contributed, the relative location of the property to the project, the portion of the project through which the drainage from the parcel flows, the value of the project to the watershed, and benefits as defined in Section 6131.01 of the Revised Code."

As to benefits, the statute prescribes:

"The county engineer, in making his estimate of the amount to be assessed each tract of land, * * * and the board of county commissioners, in amending, correcting, confirming, and approving the assessments in accordance with section 6131.22 of the Revised Code, shall levy the assessments according to

benefits. * * *"

Such benefits are to be determined from a variety of factors delineated in Sec. 6131.15 and 6131.01. Benefit, within the context of these various sections, is defined by Sec. 6131.01 as meaning "advantages to land and owners." The factors relevant in determining whether such advantages result include, as prescribed by R.C. 6131.01:

> (1) The watershed or entire land area drained or affected by the improvement;
>
> (2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;
>
> (3) The use to be made of

the improvement by any owner.

"Benefits" also include the factors of elimination or reduction of damage from flood; removal of water conditions that jeopardize public health, safety, or welfare; increased value of land resulting from the improvement; soil conservation; and providing an outlet for accelerated runoff from articifial drainage, it being the stated legislative intent that uplands that have been removed from their natural state shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from such lands.

At issue under this first assignment of error is the degree to which the engineer, and, in turn, the commissioners, based the assessments on benefits. The trial court, for its part, found that the assessments, as prepared, were proper and an examination of the evidence discloses that, based on the matters to be considered and the factors determining benefits, there was evidence to support the assessments both in character and amount of benefits.

Of importance is the trial court's approval of the method used by the engineer's office in determining benefited as being a "reasonable method" for such

purpose. This method, known as the "Preble County method," provides a specific formula to be applied, and was adapted to Seneca County's peculiarities. Elements of the formula are the amount of acreage involved on each tract and various of the benefit factors listed in R.C. 6131.01. Included also are elements of "need" and "problem correction." These elements appear to be the principal focus of appellants' appeal. They argue, as well, that the engineer, commissioners and trial court, were wrong in approving an assessment which was punitive in nature and that punishment is inappropriate in a "benefit" analysis. We will

consider these arguments.

The fact that appellants' assessment was substantially higher than adjoining landowners is a result of the engineer in assessing appellants' land affixing greater weight to various of the factors in applying the "Preble County" formula. This was so because the engineer found that appellants' property was most in need of drainage and had the greatest degree of correction required. These higher figures were used after the engineer and the commissioners had viewed the whole of the project. The commissioners also saw aerial photographs showing the ditch on appellants' land to be in worse

condition than on adjacent properties. While examination of the other properties clearly show a ditch and drainage, only on appellants' property was the original ditch entirely obliterated by cultivation practices. In fact, the evidence presented to the court clearly indicates that appellants had cultivated and planted the area where the ditch had originally been located.

Also presented to the court was evidence on the ineffectiveness of much of the work done by landowners in their attempt to reduce the amount of their original assessments. Uncontradicted testimony indicated that the work

performed did little to improve the condition of the ditch or the resultant drainage. The slope of the ditch banks was not improved; the banks were not secured to prevent future erosion; and there was some over-excavation, causing water to stand rather than flow (Transcript I, pp. 43, 37, 45-45).

Appellants argue that re-excavation and repair of the ditch on their land will not "benefit" them as that word is used in R.C. 6131.01. However, they offered themselves testimony that flooding had occurred on their land after they had obliterated the ditch by farming methods. Certainly flood prevention will benefit this land by

making it less susceptible to erosion, will conserve the soil, provide more land to be cultivated, and increase production.

We find that the Preble County formula factors of "need" and "Degree of correction," as here used by the engineer and commissioners, are consistent with the statutory factors relating to determining the benefits to a landowner of ditch repair work. We further find, in light of the circumstances, that the weight assigned these factors by the engineer and commissioners was proper, being supported by the evidence.

Appellants' arguments that the

assessment on their land is punitive is based on their claim that it constitutes punishment to them for destroying the original ditch by cultivation. We find no merit to this argument. As heretofore seen, the amount of the assessment is directly related to the benefits received by appellants' land. The actual work which must be done on their land also has relation to the benefits received and necessarily reflects that the ditch had been substantially altered by their farming practices. The assessment is not punitive but accurately reflects the needed repair and concomitant resulting benefits. See O. Jur. 3d, Interim Topics,

Drainage, Sec. 88.

We note with approval the commissioners' decision in Boyes v. Commissioners (1909), 20 O.D.N.P. 144, wherein the court stated:

> "When apportionments are arrived at through compliance with the law calling for deliberate action * * *, they enjoy a presumption that they are fair and just, and are founded upon actual benefit, which presumption can only be overthrown by clear and satisfactory evidence to the contrary."

We find that the appellants have not maintained their burden of proof under R.C. 6131.30 and have failed to show that the assessment against their land is illegal. Their first assignment of error is

found without merit.

Their second assignment of error is that the decision is against the manifest weight of the evidence. As noted, appellants had, under the provisions of R.C. 5713.30, the burden of proving that the assessment against their land was not in accordance with law. Such evidence as was not wholly in favor of the assessment's legality was contradictory. The trial court, as the trier of fact, was permitted to find that it weighed in favor of legality. In these circumstances this court is not permitted to find other than did the trier of fact. The second assignment of error is also without merit.

Having found no error prejudicial to the appellants as assigned and argued the judgment must be affirmed.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

SENECA COUNTY

IN THE MATTER OF: THE APPEAL IN THE MORRISON SINGLE COUNTY DITCH NO. L330 (FLOYD AND RITA MEYERS, APPELLANTS)

CASE NO. 13-93-13

JOURNAL ENTRY

(JUDGMENT)

This cause came on to be heard on appeal and was submitted to the Court upon the record, the briefs, and the oral argument of the appellants, the appellee having waived oral argument.

Upon consideration the Court find no error prejudicial to the appellant(s) in any of the

particulars assigned and argued in appellant's(s') brief.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court of Common Pleas of Seneca County be, and the same hereby is, affirmed at the costs of the appellant(s), for which judgment is hereby rendered, and that the cause be, and the same hereby is, remanded to that court for execution.

It is further ORDERED that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any

opinion filed concurrently herewith directly to the trial judge.

Exceptions saved.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF
SENECA COUNTY, OHIO

IN THE MATTER OF:

THE APPEAL IN THE MORRISON
SINGLE COUNTY DITCH NO. 1110

PETITIONED FOR by Marie Yennie,
Ruth Gore, Virgil Kuntz and
others

Case No. 40447

JUDGMENT ENTRY

This matter came before the Court this 16th day of November, 1981 for a pre-trial and for a view of the ditch pursuant to the previous order of the Court.

The Court, having viewed the ditch and the lands through which it passes, finds that several of the

landowners have made substantial changes in the portion of the ditch which goes through their respective properties.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the property owners make no further changes in the ditch subsequent to December 15, 1981, so that the engineers can make a final determination.

It is further ORDERED, ADJUDGED, and DECREED that the Seneca County Engineer's Office re-survey the lands which have undergone substantial changes since the time of the original survey and make a re-determination of the

factors and assessments involved based on the new survey.

It is further ORDERED, ADJUDGED, and DECREED that the additional costs of such engineering be assessed to the project.

APPENDIX E

SUPREME COURT OF THE STATE OF OHIO

IN THE MATTER OF:

THE APPEAL IN THE MORRISON
SINGLE COUNTY DITCH #1000

(FLOYD & RITA MEYERS, APPELLANTS)

S.C. 84-1817
C.A. 13-83-13
C.P. 40443

NOTICE OF APPEAL

Now come the Appellants, Floyd and Rita Meyers, by and through their attorneys, Buchanan & Stotzer, and give notice of appeal to the Supreme Court of the State of Ohio, filed on the 30th day of October, 1985; that the case is one which did not originate in the Supreme Court

of the State of Ohio. The Appellants hereby appeal the entire Ohio Supreme Court decision.

This appeal involves a substantial constitutional issue of due process, equal protection and taking of property without due process by the use (and approval by the Ohio Supreme Court, the Court of Appeals, and Trial Court) of the assessment formula used in the Trial Court, involving Sections 6131.15, and 6131.01 of the Ohio Revised Code, and the failure of the Ohio Courts to comply with the requirements of its cases which establish that if possible these courts must interpret Ohio laws so as to give force and effect to the

constitutional rights and privileges of the people, and thereby make them constitutional in application and function.

BUCHANAN & STOTZER
Attorneys for Appellants
Floyd and Rita Meyers

CERTIFICATION

This is to certify that a copy of the foregoing was mailed to Steve Shuff, Prosecuting Attorney, 106 E. Market Street, Tiffin, Ohio 44883, Clerk of Common Pleas Court of Seneca County, Seneca County Courthouse, Tiffin, Ohio 44883, and Clerk of Seneca County Court of Appeals, Seneca County Courthouse, Tiffin, Ohio 44883, on this 23rd day of December, 1985, pursuant to

S.C.U.S. Rule 29.3.

BUCHANAN & STOTZER
Attorneys for Appellants
Floyd and Rita Meyers

APPENDIX E

6131.15 Estimate of benefits and assessments; levy

The county engineer shall estimate the benefits accruing to public corporations and any department, office, or institution of the state. The engineer shall determine the estimated cost of the improvement that each public corporation and any department, office, or institution of the state shall be assessed by reason of the benefit to public health, safety, convenience, the environment, wildlife, recreation, and welfare, or as the means of improving any street, road, or highway under the

control or ownership of any public corporation or any department, office, or institution of the state, or for benefit to any land owned by any public corporation or any department, office, or institution of the state. The engineer shall prepare a schedule of assessments containing the name and address of each public corporation and each department, office, or institution of the state so benefited, the amount of the estimated assessment, and an explanation of the assessment if the assessment is for purposes other than drainage.

The county engineer shall also include in the schedule of assessments the name and address of

each private owner of land and a description of the land believed to be benefited by the proposed improvement, which names and descriptions shall be taken from the tax duplicates of the county. The engineer shall enter in the schedule the amount of the estimated assessment, which in no case shall be less than ten dollars, to be assessed to each tract of land and an explanation of the assessment, if the assessment is for purposes other than drainage, by reason of the construction of the improvement upon which the assessment is based. The total of these estimated assessments including the total estimated assessments allocated to public

corporations and the state shall equal the estimated cost of the proposed improvement.

In determining the estimated drainage assessments for a parcel, the count. engineer shall give primary consideration to the potential increase in productivity that the parcel may experience as a result of the improvement and shall also give consideration to the quantity of drainage contributed, the relative location of the property to the project, the portion of the project through which the drainage from the parcel flows, the value of the project to the watershed, and benefits as defined in section 6131.01 of the Revised

Code.

The county engineer shall also estimate the value of land or other property necessary to be taken and the damages to be sustained by any owner as a result of the construction of the proposed improvement and the subsequent maintenance of the improvement. The engineer shall prepare a schedule of damages containing the name and address of each owner alleged to be damaged, the amount of the estimated damages, and an explanation of the injury upon which the estimate is based. The engineer's land or other property necessary to be taken, the name and address of the owner, and a complete description of the land or

other property. The engineer shall include the total of the estimated damages and valuations as part of his estimate of the total cost of constructing the improvement.

The county engineer, in making his estimate of the amount to be assessed each tract of land, each public corporation, and the state in accordance with this section, and the board of county commissioners, in amending correcting, confirming, and approving the assessments in accordance with section 6131.22 of the Revised Code, shall levy the assessments according to benefits. Each tract of land and public corporation affected by an improvement and the state shall be

assessed in the proportion that each is benefited by the improvement, as "benefit" and "improvement" are defined in section 6131.01 of the Revised Code, and not otherwise.

APPENDIX G

3737.01 Definitions

As used in sections 3737.01 to 3737.64 of the Revised Code:

(A) "Owner" means any owner of any right, title, estate, or interest in or to any real property and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state, and the trustees of any state, county, or

municipal public institution. "Owner" also includes any public corporation and the director of any department, office, or institution of the state affected by an improvement but not owning any right, title, estate, or interest in or to any real property.

(B) "Land" includes any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property, and all structures or fixtures attached to real property, including but not restricted to all railroads, roads, electric railroads, street railroads, streets and street improvements, telephone,

telegraph, and transmission lines, underground cables, gas, sewage, and water systems, pipe lines and rights of way of public service corporations, and all other real property, whether public or private.

(C) "Improvement" includes:

(1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, boxing, tiling, filling, walling, arching, or any change in the course, location, or terminus of any ditch, drain, watercourse or floodway;

(2) The deepening, widening, or straightening or any other change in the course, location, or terminus

of a river, creek, or run;

(3) A levee or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;

(4) The removal of obstructions such as silt bars, log jams, debris, and drift from any ditch, drain, watercourse, floodway, river, creek, or run;

(5) The vacating of a ditch or drain.

(D) "Person" means natural person, firm, partnership, association, or corporation, other than public corporations.

(E) "Public corporation" or "political subdivision" means counties, townships, municipal corporations, school districts, park districts, turnpikes, toll bridges, conservancy districts, and all other governmental agencies clothed with the power of levying general or special taxes.

(F) "Benefit" or "benefits," except as ordered in section 6131.31 of the Revised Code, means advantages to land and owners, to public corporations as entities, and

to the state, resulting from drainage, conservation, control and management of water, and environmental, wildlife, and recreational improvements. Factors relevant to whether such advantages result include:

(1) The watershed or entire land area drained or affected by the improvement;

(2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;

(3) The use to be made of the improvement by any owner, public corporation, or the state.

"Benefit" or "benefits" includes any or all of the following factors:

Elimination or reduction of damage from flood;

Removal of water conditions that jeopardize public health, safety, or welfare;

Increased value of land resulting from the improvement;

Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto;

Providing an outlet for the accelerated runoff from artificial

drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands that have been removed from their natural state by deforestation, cultivation, artificial drainage, urban development, or other manmade causes shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from the uplands.

(G) "Environmentally significant areas" mean natural land or water areas that in some degree retain or have reestablished their natural character or have other

features of scientific or educational interest such as rare or endangered plant and animal populations or geologic, scenic, or other natural features and, because of their values and functions, contribute to the community's general welfare.

APPENDIX H

Ohio Constitution Article I. Section 19 Private property inviolate, exception

private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a

compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

APPENDIX I

COUNTY DITCH ASSESSMENTS

by

KENNETH J. YOST

Preble County Engineer

1. As we all know, the Engineer's function is one of economics as well as engineering design.

2. However, consideration of cost-effectiveness with County Ditch Drainage projects is much more sensitive and complicated than with most kinds of projects handled by the County Engineers and Commissioners.

3. The need for this special

attention to cost-effectiveness items stems from the fact that private property owners' money through assessments finances County Ditch projects, instead of public funds.

4. With public funds, the only question is as to what projects are the most important to select for investment of already-collected money. Since such money cannot be refunded to the individual tax payers, it can only be expended, and for the most advantageous purposes.

5. On the other hand, with private-funded drainage projects the first question is how much of the project should be done or whether it

should be done at all.

6. With County Ditches, the question of cost-effectiveness is complicated. E.g., it is small comfort to a property owner to hear that his investment in a sound drainage project would yield a good return and be self-amortizing from project savings, if he has little or no money to invest and can't stretch his borrowing credit that far without jeopardizing operation financing; his attitude is likely to be "hard-nosed".

7. Thus, it does not suffice merely to know over-all project costs when determining cost-effectiveness; the cost to

individual property owners particularly must be carefully ascertained and rationally explained in simple terms, before project justification recommendations and decisions can be reliably made.

8. Hence, it is imperative that the drainage engineer is able to mathematically develop strictly equitable and accurate assessments to each property owner; otherwise, there is no proper and adequate basis for judging total cost-effectiveness of a drainage project.

9. It is believed that many badly needed County Ditch projects have, in the past, failed of

approval because of arbitrary, subjectively-determined, "lumped-off" assessments that could not be explained, hence could not get acceptance.

10. Therefore, it is vital to interests of people whose drainage problems are eligible for correction by County Ditch action, that a rational, quantitative method be established that can be applied uniformly to assessment calculations.

11. Since County Ditch assessments must be based on the individual benefits to each property owner as specified in the Ohio Revised Code, the problem is to

develop a formula embodying a variable factor covering each of these outlined benefits.

12. The County Engineer is legally obligated to inform each non-petitioning property owner of the benefits for which he is being charged; submission of the assessment formula, the optional factor variables and the selected values, legally suffices as this notification. Hence, the assessment formula and its selected factor values must be complete and readily understandable to serve this purpose; otherwise, much time can be lost in difficult and often ineffective aside explanations that appear less than authoritative.

13. It is essential to study the "Ohio Jurisprudence" as well as the Ohio Revised Code Sections 6131, 6133, 6135, 6137, 6139, 6141, 3767, and 5589, to insure that all forms of assessible benefits are represented comprehensively in the assessment formula.

14. It is important to know that Ohio follows the "Roman Civil Law" drainage concept; this obligates property owners in the lower watershed to accept water and its problem from above, but corrollarily obligates the upper watershed owners to help to a minor degree to correct any problem to which their water contributes in the lower watershed. NOTE: This

principle facilities project acceptance, by upper watershed property owners, in contrast to the "English Common Law" concept where the upper-water-shed property owners have to pay more for their basic rights to outlet than the lower-watershed owners with the "real" problems.

15. Property owner "benefits" as bases for assessments should contain the following items individually, subdivided, or in consolidation with others, per Ohio Revised Code:

a. Watershed acreage.

b. Volume of water: normally the same ratio as acreage, hence

often considered in combination with it.

c. Economic use of improvement or of land area served.

d. Increased value of land: normally the same ratio as economic use, hence often considered in combination with it.

e. Provision of outlet for accellerated run-off from upper watershed.

f. Elimination of flood damage.

g. Conservation of soil.

h. Corrections of jeopardies to health, safety, or welfare.

. . . the above basic benefit into a standarized "Benefit Adjustment Formula For Assessments", as follows:

BENEFIT

ADJUSTMENT FORMULA

FOR ASSESSMENTS

(Factor a) x (Factor b) x (Factor c + d) x (Factor e + f) x (Acres) + (Factor g)

a. WATER SHED REACH SECTION FACTOR, BASED ON ACTUAL COST RATES PER FOOT

NOTE: related to proportion of improvement used by property owner's water.

10 Tenth Reach Factor

9 Ninth Reach Factor

8 Eighth Reach Factor

7 Seventh Reach Factor

6 Sixth Reach Factor

5 Fifth Reach Factor

4 Fourth Reach Factor

3 Third Reach Factor

2 Second Reach Factor

1 First Reach Factor

b. AREA LAND USE INTENSITY FACTOR

NOTE: Related to land use and value added by drainage project.

10-8 Roads, paved acres, commercial and industrial areas.

8-6 Urban residential areas.

6-4 Potential urban development areas, inside municipalities.

4-2 Agricultural areas, obvious development potential, 1 acre as residential.

2-1 Agricultural areas, remote development potential, 1 acre as

residential.

1-.25 Mixed cover rural acres, agricultural limited to pasture.

.25-.1 Wooded rural areas, no agricultural utility.

c. SURFACE DRAINAGE FACTOR (TOPOGRAPHY)

NOTE: Related to need for artificial drainage considering "natural grades".

. . .

1 D Slope - 12 - 18%

1 E Slope - 18 - 25%

1 F Slope - 25 - 35%

d. SOILS GROUP FACTOR

NOTE: Related to need for artificial drainage because of soil permeability characteristics

10 Bo, Ms, Mt, Sh

9 Bn, Br, Bs, Ct, Os, Ra, Re, So, Wn

8 Cr, Cs, Cv, Fc, Rd, Sl

7 Rc, Ws

6 Bb, Co, Da, Md, Pv, Xa

5 Ct, Cs, Cm, Fs, Su, Th, To, Sv

4 Ls, Lt, Ml, Mn, Mo, Oc, Ok, Ol, Pl, We

3 Fl, Fm, Fs, Ld, Me, Mu, Wa, Wv

2 Cn, Fa, Fg, La, Me, Mu, Wa, Wy

1 Ca

e. DEGREE OF NEED FOR PROBLEM CORRECTION

NOTE: Related to real need for real problem correction vs. "legal obligation".

10-8 Areas inundated, severe threat to structure and to health.

8-6 Areas saturated, substantial

threat to structure and to health.

6-4 Areas of slow drainage, potential threat to drainage structure.

. . .

1-1 Areas of watershed legally obligated for improvement, no new drainage benefits.

f. DEGREE OF PROBLEM CORRECTION BY PROJECT

NOTE: Related to need for additional private drainage to utilize county improvement and to proportion of improvement on individual land tracts.

10-8 Project will correct subwatershed acreage drainage needs 100%

8-6 Project will correct

subwatershed acreage drainage needs 75%

6-4 Project will correct subwatershed acreage drainage needs 50%

4-2 Project will correct subwatershed acreage drainage needs 25%

2-1 Project will correct subwatershed acreage drainage needs 5 to 10%

1-0 . Project will correct subwatershed acreage drainage needs 0%

g. SPECIAL ASSESSMENT FACTOR, EVALUATED BY STUDY

NOTE: Related to provision of items not assessible or only partially assessible to general land owners of

watershed.

17. The following columnar "Assessment Factor Sheet" form is used to apply the above formula.

ASSESSMENT FACTOR SHEET

Project Hearing _____

Ditch _____Date_____

(1) x (2) x (3 + 4) x (5 + 6) x (Benefited Acres) = Total Unites (Total United) + (Grand Total Units) x (Grand Total Project Cost) = Assessment.

18. . . . to County Ditch proposals have been effectively reduced in Preble County as is evidenced by the fact there was only one County Ditch action in twelve

years preceding 1965 vs. 507 in the twelve years after this date of the implementation of the above methods of assessment determination. It is believed that this expansion of Preble County's Ditch program is due not at all to better drainage designs, but rather to public confidence in the equitability of assessments that can be explained.

19. Although the Ohio Revised Code does not require that assessed costs to each property owner be given at a Preliminary County Ditch Hearing, it is important that owners be given tentative estimates based on the limited but best information at hand from preliminary studies. Otherwise, property owners have no

substantive basis for forming and expressing opinions to the Commissioners for their guidance. Preble County gives such estimated assessments at the first hearing because we believe that total ignorance of this assessment information could generate unfounded objections and jeopardize projects to the later regret of the objectors.

20. Some general rules governing assessments are:

a. Assessments must be accounted for by "benefits" of one or both of the following types.

1. "Real" benefits, where a property owner's "real" problem is

solved, or an outlet is provided for its solution.

2. "Legal" benefits, where an upper-watershed property owner's obligation to help correct a problem contributed to by his water, is involved.

b. A property owner cannot ordinarily be assessed for any part of an improvement that his water does not use; to impose such an assessment a specific benefit such as diversion or retardation of run-off flow from above must be shown.

c. Land not improved from its natural state for any economic use improvement, exception is location

in a developed area with developed use merely awaiting provision of a drainage structure.

d. Land already drained by tiling, etc. outside of its natural watershed cannot be assessed. Exception is where the surface water still drains through the watershed of the improvement, justifying assessments at a lower rate.

e. Assessments must provide for initial maintenance of improvement at time of project approval.

f. County Board of Commissioners must confirm assessments at final hearing.

g. Assessments must be based on actual and not estimated costs.

h. Period of payment of assessments can be set by Board of Commissioners at any reasonable period over one year if total cost exceeds $500; if not, assessment must be in two installments; excepting that $25 assessments or less must be paid in one installment.

i. A Board of County Commissioners may assess property owners within a municipality for a drainage improvement. NOTE: This capability normally assures substantial savings to urban owners through County Ditch rather than

municipal storm sewer action.

j. Property owners are entitled to notice of assessments by mail or if mail not deliverable by legal newspaper advertisements; thus, notification is considered substantive, whether actually "read" or not.

k. Excess funds remaining from improvement assessments must be accumulated in the General Drainage Improvement Fund, or the General Fund; they may not be used for maintenance.

l. Maintenance must not be paid from General Fund but from assessment proceeds.

m. Maintenance assessments must be reviewed every six years.

n. . . . funding, assessments which includes interest, unless paid within 30 days after final hearing. NOTE: Bonds cannot be used to finance joint county projects.

o. Assessments become liens on land.

p. County Commissioners have pre-eminent authority to assess the State of Ohio.

q. Ohio Turnpike authority is only property owner exempt from 6131 assessment laws.

r. "Damages" allowed by Board of Commissioners in single county

ditches may not be deducted from individual assessments, being directly payable from total collected assessments as a project cost.

s. "Damages" allowed by Board of Commissioners in joint county ditches are not a part of improvement cost used as a basis of assessments; they must be paid out of the General Fund of the County of property location.

t. Those "Damages" allowed later by courts cannot be recovered by assessments but must be paid from the General Drainage Improvement Fund or the General Fund.

u. Assessments can be utilized

to penalize land owners or their predecessors whose deliberate or passive negligence has contributed to the expense of an improvement or its repair.

21. Drainage assessment considerations might be summarized as follows:

a. Assessments should be determined objectively using a formula of comprehensive benefit factors.

b. Selection of formula factors should be readily explainable and justifiable to property owners in order to get their support.

c. Individual assessments as well as total project costs should be considered in judgment by county officials as to whether project "benefits exceed costs".

APPENDIX I

6131.21 Final hearing; approval of improvement; factors considered; costs; appeal

At the final hearing on a proposed improvement, after hearing all the evidence offered in the proceedings and after receiving and considering all the schedules, plans, and reports filed by the county engineer, the board of county commissioners shall review and reconsider the former order made by it finding in favor of the improvement and shall either affirm its former order and proceed to confirm the assessments and order the letting of the contract or shall

set aside its former order and dismiss the petition. At the final hearing, if the board finds that the cost of the improvement will be equal to or greater than the benefits that will be derived therefrom if constructed, or if the board finds that the improvement is not necessary, or if it finds that the improvement will not be conducive to the public welfare, the board shall set aside the former order finding in favor of the improvement made by it at the first hearing and shall dismiss the petition. In determining whether or not the improvement should be granted, the board shall consider the following factors:

(A) The cost of location and construction;

(B) The compensation for land or other property necessary to be taken;

(C) The effect on land along or in the vicinity of the route of the improvement;

(D) The effect on land below the lower terminus of the improvement that may be caused by constructing the improvement;

(E) The sufficiency or insufficiency of the outlet;

(F) The benefits to the public welfare;

(3) The benefits to land, public corporations, and the state needing the improvement;

(H) Any other proper matter that will assist it in finding for or against the improvement.

If the petition is dismissed at the final hearing, all costs for the proceedings, including the costs incurred by the engineer in making surveys, plans, reports, and schedules, may be distributed to the benefiting landowners in the same ratio as determined by the engineer in the final estimated assessments presented at the final hearing. The board shall confirm or alter the assessments as provided for in

section 6131.22 of the Revised Code. The approved assessments shall then be certified to the county auditor to be administered pursuant to section 6131.49 of the Revised Code.

If the costs are not distributed to the benefiting landowners, they shall be paid from county funds.

The petitioner, or any owner in favor of the improvement, may appeal from the order of dismissal, as provided in section 6131.25 of the Revised Code.

An order issued by the board under this section is effective on the day of the hearing at which the board issued it.

APPENDIX K

6131.22 County commissioners' duties as to assessments; appeal

At the final hearing on a proposed improvement, if the petition is not dismissed, the board of county commissioners shall hear any evidence offered for or against the assessment proposed to be levied against any owner or on any land as shown by the schedule of assessments filed by the county engineer and shall hear any competent evidence on the question of benefits. The board, from the evidence offered and from an actual view of the premises, shall amend and correct the assessments, and the assessments so

amended or corrected shall be approved by the board. That part of the assessment that is assessed for benefits to the general public because the improvement is conducive to the public welfare shall be paid by the public and shall be assessed against the county payable from the general fund. Such part of the assessment as is found to benefit state roads or highways shall be assessed against the state payable from motor vehicle revenues. Such part of the assessment as is found to benefit county roads or highways shall be assessed against the county payable from motor vehicle revenues. Such part of the assessment as is found to benefit any public

corporation or political subdivision of the state shall be assessed against the public corporation or political subdivision and shall be paid out of the general funds or motor vehicle revenues of the public corporation or political subdivision of the state, except as otherwise provided by law. The board shall approve and confirm the assessments, shall order the engineer to receive bids for the construction of the proposed improvement, and shall fix the date, time, and place for the receiving of bids, which shall be not less than twenty-five days after the date of th order. The board shall determine when the assessments shall be paid and shall determine

whether bonds or notes shall be issued in anticipation of and payable out of the installments of assessments. The board's orders approving the assessments and ordering the engineer to receive bids, and other orders made at this hearing, shall be entered on its journal. The clerk of the board of county commissioners shall immediately transmit to the county auditor the schedules listing all assessments as approved by the board.

Any owner opposed to the granting of the petition, or any owner opposed to further proceedings in the improvement, or any owner who claims that the assessment levied

against him is excessive or is not in proportion to benefits, may appeal from any order made pursuant to this section, as provided in section 6131.25 of the Revised Code.

An order issued by the board under this section is effective on the day of the hearing at which the board issued it.

AFFIDAVIT OF SERVICE

I, Jonathan G. Stotzer, being an attorney at law licensed to practice in the State of Ohio, and associated with the counsel of record in this appeal, do hereby state that in accordance with U.S.S.C. Rule 28, I did personally prepare and transmit, by first class, prepaid, mail, to the attorneys for the appellee in this matter, Mr. Steve C. Shuff, Seneca County Prosecutor, 106 E. Market, Tiffin, Ohio 44883, three (3) copies of this jurisdiction statement, at the address contained herein. Said mailing being done by

Zonesher Sk Shuttear

Kelly A. Shaw
Notary Public expires 2-15-10

85-1261

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

IN RE THE MATTER OF MORRISON SINGLE COUNTY DITCH NO. 1330
(FLOYD AND RITA MEYERS-vs.-THE SENECA COUNTY, OHIO BOARD OF COMMISSIONERS)

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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5 5 PP

ISSUES ON MOTION TO DISMISS

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

LISTS OF PARTIES TO THIS APPEAL

1. Floyd and Rita Meyers, represented by Attorney J. Vincent Buchanan, Buchanan & Stotzer, 8500 U.S. 23 North, Risingsun, Ohio 43457, and Attorney William Caughey, 221 E. Front, Pemberville, Ohio 43450, who is counsel of record.

2. The Seneca County, Ohio Board of Commissioners, in their official capacity, represented by Prosecuting Attorney of Seneca County, Ohio, Mr. Steve C. Shuff, and Special Assistant Prosecuting Attorney, Ms. Elaine Knutson, 106 E. Market Street, Tiffin, Ohio 44883, and Attorney Donald James Guernsey, 142 West Tiffin Street, Fostoria, Ohio, 44883, who is counsel of record.

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TABLE OF AUTHORITIES

STATUTES

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(Appendix C) 13, 14, 32-38

Section 6131.15 O.R.C.
Effective prior to April 9, 1981
(Appendix D) 13, 14, 39-43

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CASES

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79 O.S. 348, (1909) 18, 19

Blue et al. v. Wentz et al.
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122 O.S. 226 (1930) 17

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443, 19 S. Ct. 187 (1898) 12

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61 O.S. 55 (1899) 18

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS IN THIS CASE

Judgment Entry of Seneca County Common Pleas Court Ordering Resurvey and Reassessment of Project (Appendix A) 16, 23-25

VERBATIM RECITATION OF RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATION

The full text of the relevant constitutional provisions and statutes are set out in the appendices herein. The specific appendices are listed in the Table of Authorities and Reference to the Official and Unofficial Reports.

The text of "County Ditch Assessments" by Kenneth J. Yost, Preble County Engineer is not set forth herein in the interests of brevity since it is set forth in full in the Appellants' Jurisdictional Statement in Appendix I, page 116.

STATEMENT OF FACTS

This ditch improvement was petitioned by landowners in the Morrison Ditch watershed. The Seneca County Board of Commissioners viewed the ditch on March 11, 1975. The Preliminary Report of the County Engineer on March 27, 1975, stated that the project length needed to be extended. The original hearing on March 27, 1975, was continued in order to notify landowners who were in the watershed as extended. On April 24, 1975, a second hearing was held. The Board of Commissioners passed a resolution finding for the improvement on April 24, 1975. The Schedule of Assessments and Engineer's Report were filed with the Clerk of the Seneca County Board of Commissioners along with maps and a set of construction plans. The Final Hearing on the Engineer's

report and estimated assessments was scheduled for March 24, 1981. On April 7, 1981, the Board of County Commissioners, by resolution, confirmed the assessments and ordered the letting of contracts for construction of the project.

The Board of County Commissioners' decision of April 7, 1981, was appealed to the Seneca County Common Pleas Court on April 24, 1981. The Common Pleas Court ordered the Seneca County Engineer's Office to recompute the assessments based upon the fact that several landowners had excavated dirt from the ditch on their own. The Seneca County Engineer's Office rechecked the profiles and refigured the assessments taking into account the dirt which had been excavated. This resulted in a lower project cost since the amount of dirt to be excavated was reduced. The excava-

tions were not done according to the project specifications, slopes were not seeded or protected, and some over-excavation occurred. Basically, they simply dug a trench with no attention to the plan or erosion control.

The Appellants presented several witnesses. Donald Hall was presented as a drainage expert. He was shown photos of the Appellants' farm (Exhibit D). He testified that he observed little or no ditch there. (Transcript I, p. 40) He also testified that the assessment method used (Preble County Method) appears to be reasonable. (T. I, p. 40) The ditch, as shown to the witness prior to the petiton, he testified, would not drain any substantial amount of water. As the ditch was petitioned, the Meyers' property required a high degree of correction. (T. I, p. 42-43) Mr. Hall

also stated that photograph 30 in Exhibit F (a photograph of the Meyers' property) had a bank that was a "little steeper than it should be," that "some soil will erode from that bank," and that there is no cover on that bank. (T.I.,, p. 43) Mr. Hall would also recommend a two to one slope for this area (two feet horizontally for every foot vertically). In addition, Mr. Hall stated that he found the construction plans to be excellent (T. I., p. 50).

The Appellants then called Gene Baltes from the Seneca Soil Conservation Service who testified as to soil types in the area.

The next witness was Dale Phillips who is a part-time excavator. He testified that he would estimate the present bank slope as a one to one and that the slope does erode easily. (T., p. 86) He also testified as to costs to exca-

vate the project. Upon cross-examination he indicated that his estimate did not include building or excavating to the specifications of the plans,and did not include rip-rap (stone placed in strategic areas to lessen erosion) or seeding of the banks. (T. I., p. 87) Mr. Phillips further indicated that he does not check for "free-board" for tile (distance between drainage tile and bottom of the ditch).

The Appellants then presented the testimony of Terry McConnell who also does excavation. He testified that part of the ditch which he recently cleaned had silted back in. (T. I., p. 99)

The Appellants also called Clayton Meyers, a landowner, who stated he was in favor of the drainage project. (T. I., p. 108)

The Appellants next called Preston

Spencer, Seneca County Engineer, in regard to the project.

Finally, one of the Appellants, Floyd Meyers, testified. Mr. Meyers testified that he has to open up the ditch every two or three years. Mr. Meyers testimony cannot reasonably he summarized as it was quite confusing and unclear. At one point he testifed as follows:

> We was figuring on plowing to get it loose and plow it through to get all that ground loose, because it was all about shut, and get that ground loose, and it was opened up for two weeks more, and it was right in the middle of summer, and it shows if he opened it up it would be under water like some of these other pictures. It was done in the middle of summer in the dry season, it was done, and that is when most of this work was done too, in the middle summer in the dry weather." (T. II., pp. 22-23)

Mr. Meyers presented some bills but was not sure just what lands they were for.

He also presented some photographs but did not know just when they were taken.

The Appellees then presented their case. James Homan, an employee of the Seneca County Engineer's Office testified that in 1975 there was standing water all over Appellants' property (farm that abuts Kuntz property) and that the channel was hard to find and then it just kind of disappeared. (T. II., pp. 38-39) He also testified that the channel appeared to be farmed right across. (T, II., p. 45)

C. Leverne Wertz, a County Commmissioner in Seneca County testified next. He stated that when he viewed the ditch on March 11, 1975 there was wheat stubble growing right through the ditch. (T. II., p. 64) There was no bank on the Appellants' property, it was practically level. (T. II., p. 65) He also testified that he could see cultivation

marks through the field where the ditch should be (again referring to Appellants' property. (T. II., P. 70)

Robert Stoneham, an employee for the Seneca County Engineer's Office then testified. He explained the procedures used to figure assessments using the "Preble County Method." T. II., pp. 90-100 and 104-108)

The next witness was Virgil Kuntz who testified that he owns a farm next to the Appellants. The Appellants have owned the farm since approximately 1958. (T. II, p. 103) He stated that he observed practically no channel through Appellants' land and that the Appellants use the creek area as farm land and he goes right through it. (T, II., p. 103) Mr. Kuntz also testified that the Meyers' farm had flooding -- big ponds, big lakes, big flat areas of water about

any time it rained. (T. II., p. 103)

Mr. Robert Stoneham then testified further regarding the preparation of assessment figures and the mechanics of figuring the assessments using the "Preble County Method."

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The issue of assessments in situations such as drainage are functions of state law. The State of Ohio has set forth the factors to be considered in making assessments for drainage improvements.

Assessments for improvements, such as those imposed by Ohio drainage laws are founded upon the principle that the benefit derived from the improvement is different from the general benefits enjoyed by the public from the improvement. Such assessments are based on the doctrine of enhanced values - the assessments are lawful and constitutional to the extent the costs of assessments provide benefits equal to or in excess of the costs assessed.

One of the earliest cases to examine the issue of special assessments for improvements was Norwood v. Baker, 172 U.S. 269, 43 L. Ed. 443, 19 S. Ct. 187 (1898). This was soon followed by several cases which discussed special assessments in regard to various improvements.

Generally, these cases, while dealing with different improvements, found that the determination of benefits is a legislative function. Thus, there is no violation of the 14th Amendment to the United States Constitution since the assessments are based upon the benefits received. See Laskey v. Hilty, 91 O. App. 136 (1951) for an excellent discussion of these cases as applied to special assessments in Ohio.

The assessment method used by the Seneca County Engineer, known as the "Preble County Method" and approved by the Seneca County Commissioners on April

7, 1981, meets the criteria and guidelines set forth by Sections 6131.01 and 6131.15 of the Ohio Revised Code as effective prior to April 9, 1981. Section 6131.01 and 6131.15 of the Ohio Revised Code prior to April 9, 1981, are set forth in Appendix B and D herein and as effective April 9, 1981, in Appendix C and E herein.

The main difference in the Section 6131.01 Ohio Revised Code versions appears to be the renumbering of the paragraphs so that the contents of the earlier version Paragraph G are incorporated into Paragraph F of the April 9, 1981 version. In addition, environmental, wildlife, and recreational improvements are to be considered in the post April 9, 1981 version. In Section 6131.15 Ohio Revised Code the newer

version requires the Engineer to give primary consideration to the potential increase in productivity that the parcel may experience.

In the Appellants' case, the testimony and evidence was that there was little if any ditch on his property, that his property frequently became a lake or pond or "looked like the Mississippi River." The testimony and photographs also demonstrated that the Appellants had plowed through the area in one portion where the ditch should be. The elimination of Appellants' flooding and the prevention of soil erosion will certainly increase Appellants' potential productivity and is of great benefit to them.

Whereas Appellants refer to Sections 6131.01 and 6131.15 of the Ohio Revised Code, Appellants fail to note that these sections were amended as of

April 9, 1981, after the assessments and resolution by the County Commissioners approving this project. Appellants herein only cite these sections as they became effective on and after April 9, 1981. Appellants do not recognize the statutes as they existed during the time the assessments were made and the Resolution to Proceed with the improvement by the Seneca County Board of County Commissioners (which is the subject of this appeal) was made on April 7, 1981. It clearly appears that the applicable law should be that law in effect at the time the assessments and resolution to proceed occured.

It should be noted that the trial court required the Engineer to recalculate the assessments subsequent to April 9, 1981, in order to determine the costs of the proposed improvements based on

the fact that several landowners had excavated portions of the ditch on their own. No other changes in the assessments were made and the refiguring only took into account factual changes made during the pendency of the action in amounts of dirt to be excavated. (See Appendix A for Common Pleas Journal Entry)

The Appellants cite a number of Ohio cases which they claim support their position. An examination of these cases shows that many of them relate to cases in which the lands to be assessed received little or no benefit. The Appellees herein do not disagree with the proposition that an assessment cannot be placed on private property for the sole benefit of another but submit that the assessment herein for the drainage improvement is of great benefit to the lands owned by Appellants.

In the case off In Re County Ditch, 122 O.S. 226 (1930) the court indicated that the assessments must be in proportion to the benefits accruing to each property. Based upon the evidence at the Common Pleas level, it is clear that the Appellants' lands will benefit greatly and more than the neighboring lands since Appellants have the most extensive flooding problems, no channel for the water in places and the most extensive erosion problems.

In Chamberlain v. City of Cleveland 34 O.S. 55, (1878) the court indicated in the syllabus the following:

> 1. To enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment, and specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred thereby.

This holding in Chamberlain is consistent with the facts in the instant case since the evidence showed that the Appellants herein would receive substantial benefits in excess of the costs asssessed. Appellants also cite Walsh v. Barron, Treas., 61 O.S. 55 (1899) and Blue et al. v. Wentz et al. 54 O.S. 547 (1896). Both of these cases also found that assessments may be levied in regard to the benefits which accrue to the land from such project. It should be noted that the law has changed since the Blue case substantially since it also held that lands which had natural drainage had no obligation to pay for water leaving such lands.

In Alma Coal Co., v. Cozad,79 O.S. 348 (1909) the court found that Alma Coal Co. would derive no benefit from a fence between its property (a below

surface coal mine with unused waste land on the surface) and the neighboring property and thus could not be assessed for a portion of the fence's cost.

The Alma Coal case is distinguishable from the instant case since Appellants herein clearly receive benefits for the proposed improvement.

Appellees herein further submit that the very factors which make Appellants land, their benefits and their assessments unique and within the framework of "benefits" received by their lands are the real basis of their objections. They object because their assessments are different from the assessments on neighboring lands. The very objective of the assessment procedures as set forth in Ohio statutes and case law is based on individual assessments of benefits received. The Appellants had no channel in areas (even

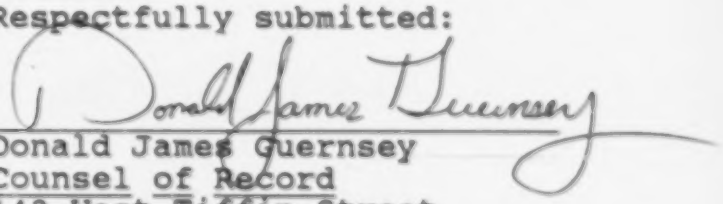
after their so-called "excavation" the evidence showed the channel was a shallow plow furrow which was totally inadequate in terms of depth, capacity to carry water, and protection on slope or banks to prevent erosion). The evidence also showed that the Appellants had the most extensive flooding and erosion--some of it apparently caused by their farming through the drainage area. Thus, the Appellants' Degree of Need of Problem Correction was substantially greater than any of their neighbors and the Degree of Problem Correction by the project in regard to Appellants' lands was considerably higher than their neighbors who had a ditch and channel for the water.

The entire case is a state law issue - assessments are within the legislative function. The State of Ohio

has set forth drainage assessment criteria, and the method used in the instant case is reasonable and met the criteria set forth by Ohio statutes in effect at the time. The evidence supports the assessment made on Appellants' lands.

There is no substantial federal question and, thus, this appeal should be dismissed.

Respectfully submitted:



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APPENDICES

APPENDIX A

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

IN THE MATTER OF:

THE APPEAL IN THE MORRISON SINGLE COUNTY DITCH NO. 1330

Case No. 40443
Miscellaneous

PETITIONED FOR by Marie Yennie, Ruth Gore, Virgil Kuntz and others

JUDGMENT ENTRY

This matter came before the Court this 16th day of November, 1981 for a pre-trial and for a view of the ditch pursuant to the previous order of the Court.

The Court, having viewed the ditch and the lands through which it passes, finds that several of the landowners have made substantial changes in the portion of the ditch which goes through

their respective properties.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the property owners make no further changes in the ditch subsequent to December 15, 1981, so that the engineers can make a final determination.

It is further ORDERED, ADJUDGED, and DECREED that the Seneca County Engineer's Office re-survey the lands which have undergone substantial changes since the time of the original survey and make a re-determination of the factors and assessments invclved based on the new survey.

It is further ORDERED, ADJUDGED, and DECREED that the additional costs of such engineering be assessed to the project.

s/Peter M. Handwork
JUDGE

This entry prepared by:
Elaine J. Knutson
Assistant Prosecuting Attorney
and Attorney for Defendant
Seneca County Commissioners
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APPROVED:

s/Thomas E. Osborn,
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APPENDIX B

SECTION 6131.01 OHIO REVISED CODE EFFECTIVE PRIOR TO APRIL 9, 1981

As used in sections 6131.01 to 6131.64, inclusive of the Revised Code:

(A) "Owner" means any owner of any right, title, estate, or interest in or to any real property, and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state of Ohio, and the trustees of any state, county, or municipal public institution. "Owner" also includes any public corporation and the director of any department, office, or institution

of the state affected by an improvement, not owning any right, title, estate, or interest in or to any real property.

(B) "Land" includes any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property, and all structure, or fixtures attached to real property, including but not restricted to all railroads, roads, electric railroads, street railroads, streets, and street improvements, telephone, telegraph and transmission lines, underground cables, gas, sewage, and water systems, pipe lines and rights of way of public service corporations, and all other real property whether public or private.

(C) "Improvement" includes:

(1) The location, construction, reconstruction, reconditioning, widen-

ing, deepening, straightening, altering, boxing, tiling, filling, walling, arching, or any change in the course, location or terminus of any ditch, drain, watercourse or floodway;

(2) The deepening, widening, straightening, or any change in the course, location, or terminus of a river, creek, or run;

(3) A levee, or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;

(4) The vacating of a ditch or drain.

(D) "Person" means natural person, firm, partnership, association or corporation, other than public

corporations.

(E) "Public corporation" or "political subdivision" means counties, townships, municipal corporations, school districts, park districts, turnpikes, toll bridges, conservancy districts, and all other governmental agencies clothed with the power of levying general or special taxes.

(F) "Benefit" or "benefits" means advantages to land, and owners, to public corporations as entities, and to the state of Ohio, resulting from drainage, conservation, and control and management of water. In determining benefits, consideration shall be given to:

(1) The watershed or entire land area drained or affected by the improvement;

(2) The total volume of water draining into or through the improve-

ment, and the amount of water contributed by each land owner;

(3) The use to be made of the improvement by any owner, public corporation, or the state of Ohio.

(G) "Benefits" include any or all of the following factors:

(1) Elimination or reduction of damage from flood;

(2) Removal of water conditions that jeopardize public health, safety, or welfare;

(3) Increased value of land resulting from the improvement;

(4) Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto;

(5) Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improve-

ment is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands which have been removed from their natural state by deforestation, cultivation, artificial drainage, urban development or other man-made causes, shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from said uplands.

APPENDIX C

SECTION 6131.01 OHIO REVISED CODE

EFFECTIVE AFTER APRIL 9, 1981

As used in sections 6131.01 to 6131.64 of the Revised Code:

(A) "Owner" means any owner of any right, title, estate, or interest in or to any real property and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state, and the trustees of any state, county, or municipal public institution. "Owner" also includes any public corporation and the director of any department, office or institution of the state affected by an improvement but not own-

ing any right, title, estate, or interest in or to any real property.

(B) "Land" includes any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property, and all structures or fixtures attached to real property, including but not restricted to all railroads, roads, electric railroads, street railroads, streets and street improvements, telephone, telegraph, and transmission lines, underground cables, gas, sewage, and water systems, pipe lines and rights of way of public service corporations, and all other real property whether public or private.

(C) "Improvement" includes:

(1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering,

boxing, tiling, filling, walling, arching, or any change in the course, location, or terminus of any ditch, drain, watercourse, or floodway;

(2) The deepening, widening, or straightening or any other change in the course, location, or terminus or a river, creek, or run;

(3) A levee or any wall, embankment, jetty, dike, dam sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;

(4) The removal of obstructions such as silt bars, log jams, debris,and drift from any ditch, drain, watercourse, floodway, river, creek, or run;

(5) The vacating of a ditch or drain.

(D) "Person" means natural person, firm, partnership, association, or corporation, other than public corporations.

(E) "Public corporation" or "political subdivision" means counties, townships, municipal corporations, school districts, park districts, turnpikes, toll bridges, conservancy districts, and all other governmental agencies clothed with the power of levying general or special taxes.

(F) "Benefit" or "benefits," except as ordered in section 6131.31 of the Revised Code, means advantages to land and owners, to public corporations as entities, and to the state resulting from drainage, conservation, control and management of water, and environmental, wildlife, and recreational improvements. Factors relevant to whether such advan-

tages result include:

(1) The watershed or entire land area drained or affected by the improvement;

(2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;

(3) The use to be made of the improvement by any owner, public corporation, or the state.

"Benefit" or "benefits" includes any or all of the following factors:

Elimination or reduction of damage from flood;

Removal of water conditions that jeopardize public health, safety, or welfare;

Increased value of land resulting from the improvement;

Use of water for irrigation, storage, regulation of stream flow, soil

conservation, water supply, or any other purpose incidental thereto;

Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands that have been removed from their natural state by deforestation, cultivation, artificial drainage, urban development, or other manmade causes shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from the upland.

(G) "Environmentally significant areas" mean natural land or water areas that in some degree retain or have reestablished their natural character or

have other features of scientific or educational interest such as rare or endangered plant and animal populations or geologic, scenic, or other natural features and, because of their values and functions, contribute to the community's general welfare.

APPENDIX D

SECTION 6131.15 OHIO REVISED CODE EFFECTIVE PRIOR TO APRIL 9, 1981

During the survey and preparation of plans, the county engineer shall appraise the benefits accruing to public corporations and any department, office, or institution of the state. He shall determine the per cent of total construction cost of the improvement which each public corporation and any department, office, or institution of the state shall be assessed by reason of the benefit to public health, safety, convenience, and welfare, or as the means of improving any street, road, or highway under the control or ownership of such public corporation or any department, office, or institution of the state, or for benefit to any land

owned by any public corporation or any department, office, or institution of the state. He shall prepare a schedule of assessments containing the name and address of each public corporation and each department, office, or institution of the state so benefited, the amount of the appraised assessment and an explanation of the benefits upon which the assessment is based.

The county engineer shall prepare a second schedule of assessments containing the name and address of each private owner of land and a description of the land believed to be benefited by the proposed improvement, which names and descriptions shall be taken from the tax duplicates of the county. He shall enter in such schedule the amount of the appraised assessment to be assessed to each tract of land, and an explanation

of the benefits, by reason of the construction of the improvement, upon which the assessment is based. The total of these appraised assessments plus the total appraised assessments allocated to public corporations and the state shall equal the estimated cost of the proposed improvement.

The county engineer shall also appraise the value of land or other property necessary to be taken and the damages to be sustained by any owner as a result of the construction of the proposed improvement and the subsequent maintenance of such improvement. He shall prepare a schedule of damages containing the name and address of each owner appraised to be damaged, the amount of the appraised damages, and an explanation of the injury upon which said appraisal is based. The engineer's schedule of damages shall also contain

the value of the land or other property necessary to be taken, and the name and address of the owner, and a complete description of such land or other property. He shall include the total of such appraised damages and valuations as part of his estimate of the total cost of constructing the improvement.

The county engineer, in making his estimate of the amount to be assessed each tract of land, public corporation, and the state in accordance with this section, and the board of county commissioners, in amending, correcting, confirming, and approving the assessments in accordance with section 6131.22 of the Revised Code, shall levy the assessments according to benefits. All land, public corporations, and the state affected by an improvement shall be assessed in the proportion that it is

specially benefited by the improvement, as "benefit" and "improvement" are defined in section 6131.01 of the Revised Code, and not otherwise.

APPENDIX E

SECTION 6131.15 OHIO REVISED CODE

EFFECTIVE AFTER APRIL 9, 1981

The county engineer shall estimate the benefits accruing to public corporations and any department, office, or institution of the state. The engineer shall determine the estimated cost of the improvement that each public corporation and any department, office, or institution of the state shall be assessed by reason of the benefit to the public health, safety, convenience, the environment, wildlife, recreation, and welfare, or as the means of improving any street, road, or highway under the control or ownership of any public corporation or any department, office, or institution of the state, or for benefit to any land owned by any public corporation or any department, office,

or institution of the state. The engineer shall prepare a schedule of assessments containing the name and address of each public corporation and each department, office, or institution of the state so benefited, the amount of the estimated assessment, and an explanation of the assessment if the assessment is for purposes other than drainage.

The county engineer shall also include in the schedule of assessments the name and address of each private owner of land and a description of the land believed to be benefited by the proposed improvement, which names and descriptions shall be taken from the tax duplicates of the county. The engineer shall enter in the schedule the amount of the estimated assessment, which in no case shall be less than ten dollars, to be assessed to each tract of land an an explanation of the assessment, if the

assessment is for purposes other than drainage, by reason of the construction of the improvement upon which the assessment is based. The total of these estimated assessments including the total estimated assessments allocated to public corporations and the state shall equal the estimated cost of the proposed improvement.

In determining the estimated drainage assesssments for a parcel, the county engineer shall give primary consideration to the potential increase in productivity that the parcel may experience as a result of the improvement and shall also give consideration to the quantity of drainage contributed, the relative location of the property to the project, the portion of the project through which the drainage from the parcel flows, the value of the project

to the watershed, and benefits as defined in section 6131.01 of the Revised Code.

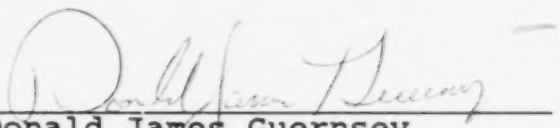
The county engineer shall also estimate the value of land or other property necessary to be taken and the damages to be sustained by any owner as a result of the construction of the proposed improvement and the subsequent maintenance of the improvement. The engineer shall prepare a schedule of damages containing the name and address of each owner alleged to be damaged, the amount of the estimated damages, and an explanation of the injury upon which the estimate is based. The engineer's schedule of damages shall also contain the value of the land or other property necessary to be taken, the name and address of the owner, and a complete description of the land or other property. The engineer shall include

the total of the estimated damages and valuations as part of his estimate of the total cost of constructing the improvement.

The county engineer, in making his estimate of the amount to be assessed each tract of land, each public corporation, and the state in accordance with this section, and the board of county commissioners, in amending, correcting, confirming, and approving the assessments in accordance with section 6131.22 of the Revised code, shall levy the assessments according to benefits. Each tract of land and public corporation affected by an improvement and the state shall be assessed in the proportion that each is benefited by the improvement, as "benefit" and "improvement" are defined in section 6131.01 of the Revised Code, and not otherwise.

CERTIFICATE OF SERVICE

I, Donald James Guernsey, being Counsel of Record, hereby certify that, in accordance with United States Supreme Court Rule 28.5(b) three copies of this Motion to Dismiss were deposited at the United States Post Office in Tiffin, Ohio, with first class postage prepaid, addressed to Counsel of Record, William Caughey, 221 East Front Street, Pemberville, Ohio 43450 on the 7th day of March, 1986.



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